In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1184

E. I. MALONE, Commissioner of Labor and Industry for the State of Minnesota,

Appellant,

vs.

WHITE MOTOR CORPORATION and WHITE FARM EQUIPMENT COMPANY,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

Appellant appeals from the judgment of the United States Court of Appeals for the Eighth Circuit entered on December 2, 1976, reversing the judgment of the United States District Court for the District of Minnesota and ruling that the National Labor Relations Act preempts the Minnesota Private Pension Benefits Protection Act, Minn. Stat. §§ 181B.01-.17 (1976). Appellant submits this brief in support of its position that the judgment of the court of appeals was incorrect and should be reversed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 545 F.2d 599 (1976), and the opinion of the United States District Court for the District of Minnesota is reported at 412 F. Supp. 372 (1976). Both opinions are reproduced in full in the Appendix herein at A-109 and A-88 respectively.

JURISDICTION

The action leading to this appeal was initiated by appellees in the United States District Court for the District of Minnesota pursuant to 28 U.S.C. §§ 1331, 1332 and 2201-2202 for a declaratory judgment that, *inter alia*, the Minnesota Private Pension Benefits Protection Act, Minn. Stat. §§ 181B.01-17 (1976) is preempted by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*

Appellees, relying solely on the preemption issue, also moved for a preliminary injunction and on March 18, 1976, the district court entered an order ruling that the Minnesota Pension Act was not preempted by the NLRA and denying appellee's motion for a preliminary injunction. On December 2, 1976, the United States Court of Appeals for the Eighth Circuit reversed the district court and ruled that the Minnesota Pension Act was preempted by the National Labor Relations Act. A notice of appeal to this Court was filed on December 7, 1976, with the Eighth Circuit Court of Appeals. The jurisdiction of this Court to review the decision of the court of appeals is conferred by 28 U.S.C. § 1254(2). This Court noted probable jurisdiction of the appeal on October 3, 1977.

QUESTION PRESENTED

The Minnesota Pension Act protects Minnesota workers from the forfeiture of their accrued pension benefits when a plant is closed or a private pension plan is terminated. The question presented is whether the court of appeals erred in reversing the district court and ruling that the Minnesota Pension Act was preempted by the National Labor Relations Act.

STATUTE INVOLVED

The full text of the Minnesota Pension Act, Minn. Stat. §§ 181B.01-17 (1976) is set forth in the Appendix at A-132.

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND.

The action leading to the instant appeal was commenced in May, 1975, in the United States District Court for the District of Minnesota. Appellees White Motor Corporation and White Farm Equipment Company (hereinafter "White Motor") sued appellant E. I. Malone, Commissioner of Labor and Industry of the State of Minnesota (hereinafter the "State"), seeking a declaratory judgment that the Minnesota Private Pension Benefits Protection Act, Minn. Stat. ch. 181B (1976) (hereinafter "Minnesota Pension Act"),[1] was preempted by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA") and was unconstitutional under the United States and Minnesota Constitutions.

[1] The Minnesota Pension Act is contained in the Joint Appendix filed by appellants at 132. Hereafter all references to items in the Joint Appendix will be cited as "App. at —."

On November 25, 1975, White Motor moved for partial summary judgment or a preliminary injunction, based solely on the ground that the Minnesota Pension Act was preempted by the NLRA. The State moved, on the same date, for abstention pending state court interpretation of the challenged law and resolution of the state constitutional claims.

By Order dated March 18, 1976, the district court, the Honorable Donald D. Alsop, declined to abstain and ruled that the Minnesota Pension Act was not preempted by the NLRA. Consequently, the court also denied plaintiff's motion for a preliminary injunction, which was based solely on the federal preemption issue, on the grounds that there was no substantial likelihood of success on the merits.[2]

With other constitutional issues still pending before the district court,[3] White Motor appealed the denial of the preliminary injunction to the Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. § 1292(b). On December 2, 1977, the court of appeals reversed the judgment of the district court, ruling that the Minnesota Pension Act was preempted by the national labor policy embodied in the NLRA.[4]

On December 7, 1976, the State filed a notice of appeal pursuant to 28 U.S.C. § 1254(2). Following the receipt of appellant's Jurisdictional Statement and appellees' Motion to Dismiss or Affirm, this Court requested the United States Department of Justice to file a Memorandum for the United States as *Amicus Curiae*. Such a memorandum was filed in August, 1977, supporting the State's contention that the Minnesota Pension Act was not preempted by the NLRA.

[2] *See* district court opinion, App. at 106.

[3] White Motor's constitutional claims have not yet been litigated in the district court. In another case, however, a three-judge federal panel has recently upheld the constitutionality of the Minnesota Pension Act against challenges similar to those raised by White Motor. Fleck v. Spannaus, —— F. Supp. ——, No. 3-75 Civ. 178, (D. Minn. Sept. 2, 1977). The plaintiffs in Fleck v. Spannaus have noticed an appeal to this Court from the decision of the three-judge panel.

[4] *See* court of appeals opinion, App. at 109.

II. DESCRIPTION OF THE ACT.

In an attempt to protect Minnesota residents from the inadequacies of many private pension plans,[5] the Minnesota legislature enacted the Minnesota Pension Act, making it effective April 10, 1974. Shortly thereafter, after years of study,

[5] It has been estimated that, of the millions of American workers who have labored for many years with the belief that they would be receiving, upon retirement, pension benefits from their employers' private pension plans, only about 15% actually receive any of such promised pensions. *See* Hearings on Private Welfare and Pension Plans, Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 656 (June 3, 1972). (This hearing was chaired by then-Senator Walter Mondale and the hearing is hereinafter referred to as the "Mondale Hearing". A copy of this hearing was lodged with the district court herein.) Senator Harrison A. Williams, Jr., of New Jersey, made the following statement which reflects not only the deplorable condition of private pension programs but also the increasing awareness by legislative bodies of such problems in recent years:

> The subcommittee heard a long succession of witnesses tell stories of heartbreak caused when the bubble of retirement security burst.
>
> * * *
>
> And, in all of these cases, regardless of where the worker was from or what industry he was in, there was a common denominator; all of these workers had toiled away a lifetime anticipating a pension they never received. We were able to trace these personal, financial disasters to a number of specific deficiencies in pension plans.
>
> Among these were:
>
> Inadequate or nonexistent vesting provisions;
>
> Inadequate funding; . . .

Hearings, Before the Subcommittee on Labor of Senate Committee on Labor and Public Welfare, 93 Cong., 1st Sess. 173 (Feb. 15-16, 1973). For a detailed description of some of the hardships suffered by White Motor retirees as a result of the reduction in their pension benefits, *see* App. at 48-87.

Congress passed the Employee Retirement Income Security Act (hereinafter "ERISA"), 29 U.S.C. §§ 1001 *et seq.*

The Act is directed at two historically typical methods by which employers avoid the payment of retirement benefits allegedly assured by private pension plans: (a) the mass termination of employees who have participated for a reasonable number of years in their employer's pension plan before their pension benefits have vested under the plan and (b) the termination of pension plans inadequately funded to provide the retirement benefits provided for in the plan. The Minnesota Pension Act, which is administered by the state, protects Minnesota employees with ten or more years of covered service under a pension plan from the forfeiture of pension benefits resulting from either method of avoiding the payment of pension benefits.[6]

That protection is afforded by requiring a Minnesota employer who ceases to operate a place of employment in Minnesota or terminates a pension plan to pay a pension funding charge if either such action results in the forfeiture of pension benefits. Minn. Stat. §§ 181B.03-.04 (1976).[7] The pension funding charge is used to purchase annuities that will provide the protected employees with monthly pension payments on reaching retirement age. Minn. Stat. § 181B.12 (1976). The benefit provided by the annuity must be equal

[6] Those terms used in the Minnesota Pension Act are generally defined in Minn. Stat. § 181B.02 (1976). An "employee" for purposes of the Act includes these participants in the White Motor pension plan: retired former employees presently eligible for pension benefits (and, if deceased, their survivors in some instances); and "deferred vested" former employees, not of retirement age, who are eligible under the plan to receive some benefits upon reaching normal retirement age. *See* Minn. Stat. § 181B.02, subd. 4 (1976).

[7] *See also* Minn. Stat. § 181B.02, subd. 6(b) (1976).

to that portion of the employee's normal retirement benefit, as defined in the pension plan, that accrued during his or her years of covered service under the plan.

III. APPLICATION OF THE ACT TO WHITE MOTOR.

The factors leading to the instant controversy have a long history. The Minneapolis-Moline Company, a farm implement manufacturer, had operated plants in Minneapolis and Hopkins, Minnesota, for many years. Since 1950 its unionized hourly workers had been covered by the company's pension plan. Appellees purchased the Minneapolis-Moline Company[8] in January, 1963, and became the successor to its pension plan. They continued to operate the two plants for nine and one-half years.

In January, 1972, White Motor announced it was closing both plants. At that time there were about 1,000 hourly employees at the two plants.[9] On June 30, 1972, the Lake Street plant in Minneapolis, the larger of the two plants, was closed. The Hopkins plant, with more than 200 workers, was kept open. Also on June 30, 1972, White Motor attempted to terminate the pension plan for its hourly employees at both plants. Because it was held in an arbitration[10] between the union[11]

[8] Mondale Hearing at 721. Prior to this purchase, the Minneapolis-Moline Company had changed its name to Motec Industries, Inc. After purchase, plaintiffs operated the company as a division under the name Minneapolis-Moline, Inc.

[9] Mondale Hearing at 736.

[10] White Motor Corp. and U.A.W., 61 Lab. Arb. 320, 328, 331 (1973) (Seitz, Arbitrator) (hereinafter the "Arbitration Award"). In subsequent litigation, the award was upheld by the federal courts. *See* U.A.W. v. White Motor Corp., Civ. File No. 4-73-422 (D. Minn., May 6, 1974); *aff'd* U.A.W. v. White Motor Corp., 505 F.2d 1193 (8th Cir. 1974), *cert. denied*, 421 U.S. 921 (1975).

[11] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (hereinafter the "UAW").

representing the hourly employees and White Motor that the plan could not be terminated until May 1, 1974, the company again terminated the pension plan on May 1, 1974, approximately 20 days after the Minn. Pension Act went into effect. There are slightly less than 1,000 current retirees who were participants in the pension plan at the time of its termination.[12]

The federal protection afforded by ERISA did not go into effect until after the May 1, 1974, termination of the White Motor pension plan[13] and, therefore, only the Minnesota Pension Act provides protection to these participants in the pension plan who lost substantial retirement benefits because of the plan's termination.

Following notice from White Motor in April, 1974, of its intent to terminate the 1971 pension plan effective May 1, 1974, appellant Commissioner of Labor and Industry for Minnesota, pursuant to his statutory duties, commenced an investigation to determine the extent of the forfeiture of pension benefits that would result and the corresponding obligation, if any, of the company to pay a pension "funding charge"[14] under the Minnesota Pension Act.

On August 18, 1975, after the instant action was filed in district court, the state notified White Motor of the assessment of a pension funding charge and informed the company that it could request a hearing concerning, *inter alia*, the amount

[12] Mondale Hearing at 773, 774, (Table). *See* Affidavit of H. Herbert Phillips, par. 18(b), App. at 21.

[13] ERISA termination insurance provisions became effective on the date of enactment, Sept. 2, 1974, and apply retroactively to plan terminations that occurred after June 30, 1974. 29 U.S.C. §§ 1381(a) and 1381(b).

[14] *See* Minn. Stat. § 181B.03 (1976).

and method of satisfaction of that charge.[15] White Motor did request such a hearing but the hearing has been held in abeyance pending the outcome of the instant litigation. The pension funding charge cannot be certified or become due for payment until the completion of the administrative proceedings. Minn. Stat. §§ 181B.09-.11 (1976).

The following is a brief description of the pension plan's history and application to the White Motor employees.

After the pension plan was initially established in 1950, the plan was carried forward in each of the subsequent years for which collective bargaining agreements were executed: 1950, 1954, 1959, 1962, 1965, 1968 and 1971. The 1971 version of the plan (hereinafter the "1971 pension plan") is the version most pertinent to this action.[16] Over the years the plan provided for progressively increasing retirement benefits promised to the employee at the normal retirement age of 65. Even with those increases, the benefits provided during retirement on the average never exceeded $2,500.00 a year.[17] In order to encourage employees to opt for early retirement, the 1968 and 1971 versions of the pension plan also provided for supplemental retirement benefits to be paid after early retirement but only until the retiree reached 65, the normal retirement age.[18]

White Motor's promise of pension benefits upon retirement was unquestionably used by it to attract employees to its work-

[15] *See* Affidavit of Jon K. Murphy, par. 13 and Exhibit B attached thereto. App. at 35 and 40 respectively.

[16] The history of the pension plan, to the extent relevant here, is set forth in the Arbitration Award. The 1971 pension plan is fully set forth in the Record of the Mondale Hearing at 678-705 and is reproduced in part in App. at 146.

[17] Mondale Hearing at 722 (Table) and *see* the Retirees' Affidavits, App. at 47-87.

[18] *See* Arbitration Award at 331-332 and the 1971 pension plan, Sections 6.02(b) and 6.15, App. at 148-49 and 159-65, respectively.

force[19] and evidence was submitted by the State showing that the company was able to keep an employee's wage increases depressed by promising the employee a retirement pension.[20]

At the time of the closing of the Lake Street plant in 1972, the majority of the employees were between the ages of 45 and 64.[21] Some current retirees had worked at White Motor's plants for as long as 40 years and many employees retired after as long as 25 to 40 years of employment[22] with the company and its predecessor. Often other job opportunities were refused because employees did not want to lose the pension benefits they were supposed to be accruing during those years of employment.[23] Thus, over the years, the company had been rewarded with a loyal and productive workforce, and at least part of this loyalty and productivity was due to the company's promise of reasonable retirement benefits.[24]

In addition to the pension benefits outlined in the 1971 pension plan as described above, the plan also provided that pension rights would be enforceable only against the Pension Fund (§ 6.09) and that White Motor employees had no vested rights under the Plan prior to retirement (§ 6.17).[25] Furthermore, White Motor retained the right to terminate unilaterally the pension plan at any time so long as the remaining funds were properly distributed (§ 10.02).[26]

[19] Mondale Hearing at 672-673.

[20] *Id.* at 670, 715-719; Affidavit of Roy G. Pierce, par. 10, App. at 67; Affidavit of William E. Peters, par. 7, App. at 71; Affidavit of Alfred H. Behrendt, par. 7, App. at 48; and Affidavit of Clarence Grose, par. 7, App. at 62.

[21] *Id.* at 774 (Table).

[22] *See id.* at 669, 673, 674, 712, 713; Retirees' Affidavits. App. at 47-87.

[23] Mondale Hearing at 667; Affidavit of Mildred MacDonald, par. 8, App. at 83; Affidavit of Alfred H. Behrendt, par. 8, App. at 48; and Affidavit of Donald W. Duffy, par. 9, App. at 85-86.

[24] *See* Mondale Hearing at 667-668.

[25] *See* App. at 165.

[26] *Id.* at 169.

Despite these provisions, which in effect absolved the company of liability if the pension fund was insufficient to pay the accrued pension benefits, during their employment the members of the White Motor rank and file generally understood that they would each receive full pension benefits throughout their retirement years.[27] This understanding was nurtured not only by White Motor but also by the UAW[28] to such an extent that even employees who over the years had participated in contract negotiations relating to the pension plan did not question the company's promise of full pension benefits during a worker's retirement years.[29]

An employee's justifiable expectation of full pension benefits was cemented at the time of his retirement. He would execute a retirement application prepared by White Motor wherein his monthly pension benefit was set forth and wherein the company stated that the pension benefit would be paid during his remaining years of retirement in level monthly amounts and that, if elected, survivor beneficiary benefits would likewise be so paid upon his death.[30]

[27] Mondale Hearing at 670, 709; and *see* the Retirees' Affidavits, App. at 47-87. Because of this understanding, at least some did not set aside additional funds to be used to supplement other meager sources of retirement income such as social security. *See* Affidavit of William Preston, par. 8, App. at 72; Affidavit of William E. Peters, par. 8, App. at 70; Affidavit of Roy G. Pierce, par. 10, App. at 66; Affidavit of Clarence Grose, par. 8, App. at 62.

[28] Mondale Hearing at 710.

[29] *Id.* at 671-672, 709, 713; Affidavit of Emanuel Walstrom, par. 7, App. at 73; Affidavit of William E. Peters, par. 7, App. at 70; and the Affidavit of Alfred H. Behrendt, par. 7, App. at 47. And, as noted *infra*, until almost the very day when White Motor ultimately closed the Minneapolis Lake Street plant, White Motor continued to inform its employees that they would be receiving their full pensions.

[30] Mondale Hearing at 670, 715-719, and *see* the Retirees' Affidavits, App. at 47-87.

In March, 1972, White Motor announced that it intended to terminate the 1971 pension plan as of June 30, 1972, the day on which the Lake Street plant was to close.[31] But, the company did not disclose the full impact of the pension plan termination until the June 3, 1972 Mondale Hearing. At that hearing, White Motor announced that the 1971 pension plan covering its union employees was only about 30 percent funded, and that there was a net deficiency in the fund of some fourteen and one-half million dollars when the fund was measured against the present value of the pension benefits promised.[32] White Motor further announced that when the 1971 pension plan was terminated, pension benefit payments would immediately be reduced to the level of benefits determined by White Motor in a March, 1972, "Guarantee Letter" and that supplemental pension benefits owing to employees who had opted for early retirement would no longer be paid.[33] This "Guarantee Letter" effectively reduced the level of benefits provided for in the 1971 pension plan by aproximately 60 percent.[34] The reduced benefits would be paid from the pension fund until it was exhausted and thereafter directly from company funds.[35]

[31] Arbitration Award at 332.

[32] Mondale Hearing at 783. The company also terminated its other pension plan covering non-union salaried employees and executives as of June 30, 1972. In contrast, the pension fund for this plan was over seventy percent funded at the time and was, therefore, sufficiently funded to provide full pension benefits for these employees and executives during retirement. *Id.* at 736.

[33] Mondale Hearing at 738-739, 785. The "Guarantee Letter," dated March 3, 1972, is reproduced in the Record of the Mondale Hearing at 729 and in the App. at 172. It limits the company's obligation to pay pension benefits on termination of the plan and exhaustion of the pension fund to that amount necessary to pay benefits at the levels set forth in the 1968 version of the pension plan, with certain adjustments for an employee's years of credited service with the company prior to its purchase by plaintiffs in January, 1963. The letter was not a part of the 1971 collective bargaining agreement which included the pension plan and which was ratified by the rank and file. It resulted, apparently, from discussions between White Motor and the UAW in March, 1972, at about the time plaintiffs announced they were terminating the 1971 pension plan on June 30, 1972. *See* the Arbitration Award at 329.

When the pension plan was initially terminated on June 30, 1972, White Motor ceased paying regular monthly pension benefits as well as supplemental benefits where applicable, and paid benefits only to the extent offered under their "Guarantee Letter."[36] Pursuant to the arbitration award thereafter obtained by the UAW, however, the company was not only prohibited from terminating the pension plan until May 1, 1974, but was also required to pay full benefits out of the regular pension fund until it became insufficient to do so.[37] Thus, after having had benefits substantially reduced for a little over a year while litigation ensued, the retirees again received benefits under the 1971 pension plan rather than in the reduced amount set forth in the "Guarantee Letter" until the pension fund became insufficient to pay those benefits in March, 1976. As of April 1, 1976, the retirees' benefits were

[34] Letter, UAW to retirees, dated June 26, 1975, referred to in paragraph 19 of the Affidavit of Jon K. Murphy, App. at 36-37.

[35] The practical effect of this decrease in the level of benefits was graphically brought home at the Mondale hearing. For example, Emanuel Walstrom was an employee of the Lake Street plant who at that time was about to retire. Just two days before the June 3, 1972 hearing he received an early retirement application form from the company explicitly stating that under the 1971 pension plan he would be receiving $355.66 a month, including supplemental benefits until he reached 65, and then $195.11 a month in regular benefits until his death. Because of the plan's termination and its lack of adequate funding, however, Mr. Walstrom's regular monthly pension benefits for life under the "Guarantee Letter" are only $76.94, and he received no supplemental benefits. Mondale Hearing at 713, 741; and *see* the Retirees' Affidavits, App. at 47-87.

[36] App. at 171-173.

[37] *Id.*

again reduced to the level of benefits offered by the "Guarantee Letter," and those retirees are now living on approximately 40 percent of the benefits provided for under the 1971 pension plan.[38]

SUMMARY OF ARGUMENT

A. The Minnesota Pension Act is not preempted by the National Labor Relations Act since it regulates activities peripheral to the collective bargaining process and is not "plainly within the central aim of the NLRA." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). The Act comes into play only when an employer ceases operation of a place of employment or terminates a pension plan resulting in the forfeiture of accrued pension credits.

The court of appeals' reliance on *Local 24, Teamsters v. Oliver*, 358 U.S. 283 (1959) and *Lodge 76, Machinists v. Wisconsin Employment Relations Comm.*, 427 U.S. 132 (1976) was misplaced. Unlike the Minnesota Pension Act, the state antitrust law preempted in *Oliver* absolutely precluded the parties from bargaining on a mandatory subject of collective bargaining. Furthermore, the very nature of a state antitrust law is likely to bring it into direct conflict with federal labor law as exemplified in *Oliver*. Similarly, the action of the state board in *Lodge 76, Machinists*, in enjoining a concerted refusal to work overtime by union employees during the course of contract negotiations, was, unlike the situation in the instant case, obviously a direct and significant intrusion into the very heart of the collective bargaining process.

[38] The impact of this reduction upon the retirees is substantial. *See* Retirees' Affidavits, App. at 47-87 and the Mondale Hearing generally.

B. The Congress has evidenced its intent that, prior to ERISA, the regulation of pension plans was within the power of the states. When Congress, in 1958, enacted the Welfare and Pension Plans Disclosure Act, 72 Stat. 997, a precursor to ERISA, it included a provision specifically providing that the Act was *not* to preempt the law "of any State affecting the operation or administration of employee . . . pension benefit plans." It is clear from the legislative history that Congress was aware of the specific problem of the forfeiture of pension benefits caused by clauses limiting liability and intended the states to retain their traditional power in all areas of pension regulation not specifically covered by the Pension Disclosure Act.

More recently, Congress, by the very enactment of ERISA, has given a further indication that state pension regulation prior to ERISA did not conflict with the NLRA. Furthermore, the provision in ERISA preempting all state laws relating to employee benefit plans, 29 U.S.C. § 1144(a), and the legislative history of this provision, show that Congress was fully aware of the existing state power to regulate the substantive aspects of pension plans.

C. The Minnesota Pension Act is a valid police power enactment, *DeCanas v. Bica*, 424 U.S. 351, 356 (1976), and thus is not preempted by federal labor law because of the police power exception to the NLRA preemption doctrine which allows for state laws of general applicability affecting the health, safety or well-being of a state's citizens. *Farmer v. United Brotherhood, Local 25*, 97 S. Ct. 1056 (1977); *Local 24, Teamsters v. Oliver*, 358 U.S. 283 (1959).

ARGUMENT

I. THE MINNESOTA PENSION ACT IS NOT PREEMPTED BECAUSE IT DOES NOT REGULATE THE CONDUCT OF PARTIES ENGAGED IN THE COLLECTIVE BARGAINING PROCESS NOR AFFECT THE BARGAINING PROCESS.

The Minnesota Pension Act simply does not create the type of conflict with national labor policy that this Court has determined warrants preemption. Examination of those judicially-established tests for NLRA preemption, in the context of the conduct regulated by the Minnesota Pension Act, leads to the unavoidable conclusion that the Minnesota law does not conflict with the national labor policy.

A primary objective of Congress in enacting the NLRA was to establish a mechanism and framework within which labor-management relations could proceed peacefully and with a minimum of economic disruption. *See* 29 U.S.C. § 151. The mechanism relied upon was the collective bargaining process as regulated and protected by the NLRA. Much of Congressional labor policy and, correspondingly, the provisions of the NLRA are, therefore, directed primarily to the relations and conduct of labor and management while engaged in that bargaining process. Just as the major thrust of the NLRA was directed at the conduct of parties engaged in the collective bargaining process itself, it follows naturally that the primary thrust of preemption by the NLRA of state laws involves state regulation directed at the conduct of parties engaged in collective bargaining.

In furtherance of the Congressional goal of establishing and protecting effective and equitable collective bargaining, Congress identified in sections 7 and 8 of the NLRA, 29 U.S.C. §§ 157-58, certain conduct of employees and employers that is protected from interference and other conduct that is prohibited as unfair labor practices. In order to preserve the integrity of this fundamental aspect of national labor policy, this Court formulated the *Garmon* rule of preemption, explaining that:

> [w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct *so plainly within the central aim of federal regulation* involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959) (emphasis added). This standard was reiterated in *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274 (1971).

Thus, while it is clear that states may not regulate conduct "plainly within the central aim" of the NLRA, it is equally certain, that this Court

> cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationship between employees, employers, and unions; obviously, much of this is left to the states.

Amalgamated Ass'n of Street Employees v. Lockridge, supra, 403 U.S. at 289. *See Lodge 76, Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976); *Garner v. Teamsters, Chauffeurs and Helpers Local Union,* 346 U.S. 485, 488 (1953).

Although the court of appeals in the instant case, in reversing the district court, asserted that the Minnesota Pension Act alters the collective bargaining process, the activity that the Minnesota Pension Act in fact regulates is not the negotiation of the terms of a pension plan but rather an employer's cessation of the operation of a place of employment or a pension plan, resulting in the forfeiture of accrued pension credits.[39] Under the Minnesota Pension Act workers are protected by requiring the employer, in the event of a plan termination, to purchase annuities that will pay to each worker, on reaching retirement age, the benefits he or she would have received under the Plan for his years of credited service had the plan not been terminated.

Significantly, the Minnesota Pension Act contains no provisions that attempt to regulate or dictate the institution of a pension plan, the on-going operation of a pension plan, the level or type of benefits provided by a pension plan, or the inclusion of particular terms in bargaining agreements. The only conduct actually regulated by the Minnesota Pension Act is the termination of pension plans, and only such terminations as would result in the forfeiture of pension benefits. Thus, the main point of even peripheral contact between the Minnesota Pension Act and a collectively bargained pension plan is the

[39] The Minnesota Pension Act also applies where there is a "substantial reduction in the number of employees at a place of employment." Minn. Stat. § 181B.02, subd. 6(b) (1976). However, the instant action does not involve such an application of the Act.

Act's requirement that a company which contracts with its workers to pay a certain level of pension benefits upon retirement must pay those benefits notwithstanding any provision in the pension plan absolving the company of liability[40] in the event that the pension plan is terminated and the pension fund is insufficient to meet the benefit levels provided for in the pension plan.[41]

A reading of the provisions of sections 7 and 8 of the NLRA, 29 U.S.C. §§ 157-58, reveals that the conduct regulated by the Minnesota Pension Act is neither a protected activity nor a prohibited unfair labor practice. Indeed, it is clear that the conduct regulated by the Minnesota Pension Act is at most peripheral to the collective bargaining process, *see San Diego Building Trades Council v. Garmon,* 359 U.S. at 243-44, and is therefore not, in the language of *Garmon,* "plainly within the central aim of federal regulation."

The court of appeals, in ruling the Minnesota Pension Act preempted by the NLRA, relied primarily on *Local 24, Teamsters v. Oliver,* 358 U.S. 283 (1959) and *Lodge 76, Machinists v. Wisconsin Employment Relations Comm.,* 427 U.S. 132 (1976). Those two cases, however, are inapposite since they both involved conduct striking at the very heart of the collective bargaining process rather than conduct in the peripheral penumbra allowed to states by *Garmon.*

In *Oliver,* the Ohio courts had held that the state's antitrust laws rendered invalid that part of a collective bargaining agreement that established minimum rentals to be paid for trucks leased to a trucking company when the owner drove

[40] *See* text at p. —— *supra* and App. at 165, 169.

[41] The Minnesota Pension Act also gives workers vested rights after 10 years of service; whereas, the White Motor Pension Plan granted vested rights if a worker had 10 years of service and was at least 40 years of age.

the truck as an employee of the company. This Court determined that the rental provisions of the agreement were so related to the wage provisions that they were a mandatory subject of bargaining. Thus, the effect of the state antitrust law was to absolutely prohibit bargaining on a mandatory subject of collective bargaining. This Court reversed the state court, holding that the Ohio antitrust statute could not be applied to prohibit the effectuation of the parties' agreement concerning a subject of mandatory bargaining under the NLRA.[42]

The court of appeals, in expanding the *Oliver* case to cover the instant case, overlooked two fundamental, yet obvious, distinctions between the Ohio antitrust statute preempted in *Oliver* and the Minnesota Pension Act, distinctions which indicate that the nature and degree of conflict that existed between the state regulation and federal labor policy in *Oliver* are plainly not presented by the Minnesota Pension Act.

First, and most significantly, the effect of the Ohio antitrust statute in *Oliver* was to impose an *absolute prohibition* on inclusion of certain substantive terms that the parties had agreed upon in the collective bargaining agreement. Indeed, any agreement between the parties establishing minimum rentals for the driver-owned trucks would have been precluded by the Ohio law. Although the NLRA is ordinarily not concerned with the substance of collectively-bargained agreements,[43] the effect of the Ohio statute was to *absolutely preclude* negotiation and agreement on a mandatory subject of collective bargaining. Additionally, because the state antitrust law effectively prevented inclusion of the terms in the agreement, not only the bargaining process but also the ongoing employer-employee relationship during the life of the agreement was affected. It was such a direct and material interference with the bargaining process that prompted this Court to find in *Oliver* that preemption was required.

[42] It is interesting to note that even considering the clear conflict between the NLRA and the Ohio antitrust law in Oliver, the case was viewed by one commentator as being perhaps unduly broad.

> In one respect, the case [Oliver] carries the preemption doctrine even beyond the limits proposed by those who have been most ardent in favor of broad state exclusion; for the state statute whose application was disallowed clearly met the test of 'general applicability' as defined by its own advocates.

The Supreme Court, 1958 Term, 73 Harv. L. Rev. 84, 229 (1959).

In contrast, the Minnesota Pension Act does not purport to dictate the substantive terms of pension plans or to restrict the scope of the terms of agreement that the parties may reach in collective bargaining concerning pension plans. Nor does the Minnesota Pension Act intrude into the ongoing employer-employee relationship by preventing the effectuation of the terms of an extant collectively-bargained pension plan. In fact, the Minnesota Pension Act cannot even apply to a situation in which both the employment relationship and the pension plan remain in effect. Rather, the Minnesota Pension Act comes into play only when an employer ceases to operate a place of employment or terminates a pension plan.[44] Indeed, there is a further requirement that such termination results in a forfeiture of accrued pension credits before the Minnesota Pension Act can apply. Thus, the Minnesota Pension Act affects only the *dissolution* of pension rights resulting from the termination of a pension plan or the employment relationship of covered employees. That is not the type of substantive regulation of a collectively-bargained agreement that was preempted in *Oliver*; the parties here are not prevented from

[43] H. K. Porter Co. v. N.L.R.B., 397 U.S. 99 (1970).

[44] *See* n. 35 *supra*.

"carrying out their agreement" on a mandatory subject of collective bargaining in the sense that the parties in *Oliver* were.[45]

The second major distinction between *Oliver* and the instant case is that *Oliver* involved a state antitrust statute. As this Court has noted:

> [T]he accommodation between federal labor policy and antitrust policy is delicate. Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization, not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves. State antitrust laws generally have not been subjected to this process of accommodation. If they take account of labor goals at all, they may represent a totally different balance between labor and antitrust policies. Permitting state antitrust law to operate in this field could frustrate the basic federal policies favoring employee organization and allowing elimination of competition among wage earners, and interfere with the detailed system Congress has created for regulating organizational techniques.

[45] The fact that the Ohio law vitiated a contract term dealing with a mandatory subject of collective bargaining was critical in Oliver. Local 24, Teamsters v. Oliver, *supra*, 358 U.S. at 295. While pensions are a mandatory subject of collective bargaining, not every aspect of pensions falls into that category. For example, bargaining concerning retiree benefits has been held not to be mandatory. Allied Chemical & Alkali Workers of America, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). Similarly, the cost to the employer of a noncontributory group insurance plan is not a mandatory subject of collective bargaining. Sylvania Electric Products, Inc. v. N.L.R.B., 291 F.2d 128 (1st Cir.), *cert. denied*, 368 U.S. 926 (1961). Appellant is aware of no NLRB or court decisions determining that provisions of a pension plan limiting the employer's obligation to pay agreed-to pensions on termination of the plan are within the scope of mandatory bargaining subjects.

Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616, 636 (1975) (citation omitted).

Although the court of appeals chose to read *Oliver* broadly and emphasized some of its more general *dicta* relating to preemption, such an expansive reading overlooks the fact that *Oliver* was but a part of a long history of efforts by both Congress and the courts to deal with the conflict that exists between federal labor policy and antitrust policy, both at the state and federal level.[46] *See, e.g., Connell Construction Co. v. Plumbers Local 100, supra*, 421 U.S. at 635-36; *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 479-81 (1955); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, —— U.S. ——, 98 S.Ct. 28 (1977); Clayton Antitrust Act § 20, 29 U.S.C. § 52; Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1357 (1972).[47]

Indeed, the district court herein quite correctly distinguished *Oliver* from the instant case on the grounds that the state law challenged therein was an antitrust statute, recognizing that

> [s]tate antitrust statutes present unique problems in the area of labor preemption. . . .

[46] Although Oliver has been cited in cases not involving state antitrust laws, *e.g.* Lodge 76, Machinists v. Wisconsin Employment Relations Comm., 427 U.S. 132, 153 (1976), this certainly does not mean that the antitrust distinction between Oliver and the instant case is any less valid.

[47] As Professor Cox states:

> [Antitrust] statutes are based upon a view of policy towards combinations and collective action in the marketplace which is the very subject addressed by Congress in the N.L.R.A.

Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1357 (1972).

> The inherent conflict and delicate balance which exists between labor and antitrust policy does not exist between labor policy and the regulation of pensions.

412 F. Supp. at 381, App. at 105.

The court of appeals, in applying *Oliver* to the instant case, also relied extensively on *Lodge 76, Machinists v. Wisconsin Employment Relations Comm.*, 427 U.S. 132 (1976), where this Court reversed the Wisconsin Supreme Court's affirmance of the Wisconsin Employment Relations Commission's order enjoining a concerted refusal to work overtime by unionized employees during the course of contract negotiations.

This action on the part of the Wisconsin Commission was quite clearly a direct and material intrusion into the essence of the collective bargaining process. Wisconsin's restriction of the flexing of bargaining strength by one of the parties to collective bargaining understandably would have had a direct and significant influence on the substantive terms the parties could otherwise reach if left to the "free play of contending economic forces" each party could muster. 427 U.S. at 150.

In examining the *Lodge 76, Machinists* case, the court of appeals properly noted that states "may not directly control the substantive terms of the contract which results from that bargaining", 545 F.2d at 606, but, beyond this superficial statement, the court of appeals did not analyze the case nor purport to establish how it believed the Minnesota law "directly" interfered with the collective bargaining process or the substantive terms of the contract arrived at through that bargaining process. This lack of analysis by the court of appeals is critical since an examination of the Minnesota Act shows

that it is peripheral to the collective bargaining process and does not materially affect that process or alter the economic power of one party.[48]

In fact, analysis shows that, unlike the direct and material interference with the collective bargaining process involved in *Oliver* and *Lodge 76, Machinists*, the Minnesota Act operates on the periphery of that process and, although it undeniably relates to the result of that process in the instant case, it certainly does not intrude into the bargaining process so far as to mandate preemption.

A more well-reasoned and properly balanced approach to the issues raised by the *Lodge 76, Machinists* and *Oliver* cases was presented in a recent decision of the Third Circuit Court of Appeals, decided subsequent to the court of appeals' decision herein. *Amalgamated Transit Union v. Byrne*, 46 U.S.L.W. 2180 (3rd Cir. Oct. 11, 1977) (*en banc*), Daily Labor Report (BNA) Sept. 30, 1977, No. 191.

In *Byrne*, the state of New Jersey threatened to withdraw all state subsidies from various private transportation companies if the companies agreed with their unions to include unlimited cost-of-living increases in their collective bargaining agreements. Notwithstanding the fact that as a practical matter this threat no doubt absolutely precluded the parties from including such a provision in their bargaining agreements, the court determined that the significant state interest in transportation led it to believe that it was not the congressional intent to bar the state of New Jersey from establishing the conditions under which it would provide subsidies to pri-

[48] Unlike the state conduct in Lodge 76, Machinists, the Minnesota Pension Act is "not directed toward altering bargaining positions of employers or unions" and at most has but an "incidental effect on relative bargaining strength." 427 U.S. at 156. (Powell, J., and Burger, C. J., concurring).

vate transportation companies. The court arrived at this conclusion by relying on *Lodge 76, Machinists* and other decisions of this court.[49]

The *Byrne* case clearly presented a situation where the parties were effectually prevented from bargaining on an aspect of a mandatory subject of collective bargaining, but the demonstrable state interests were sufficient to overcome such a potentional impingement on federal labor policy. As recounted *supra*, the effect of the Minnesota Pension Act is peripheral to the collective bargaining process and, appellant submits, impinges far less on federal labor policy than the state action upheld in *Byrne*.

Appellant submits that the application of *Oliver* and *Lodge 76, Machinists* to the instant case by the court of appeals reflects a fundamental misunderstanding of federal labor law. The court of appeals interpreted federal labor law and, in particular, *Oliver*, to mean that all of the terms of any collectively-bargained agreement are, in a sense, sanctified by the NLRA and, thus, entirely immune from the effect of any state regulation that is not directed at the prevention of violence or criminal activity, regardless of how minimally or tangentially the state regulation affects those terms of the agreement or what relationship that effect bears to the conduct that is the focus of the NLRA. Such an unwarranted extension of *Oliver* would transform the NLRA from an expression of Congressional labor policy protecting and fostering the collective bargaining process into a "contract clause" more strict and unyielding than that found in the United States Constitu-

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[49] Although the majority opinion did not cite the Oliver case, it was certainly brought to the court's attention as one of the dissents discussed in Oliver. Daily Labor Report (BNA), *supra* No. 191 at D-5-D-6.

tion.[50] Appellant does not believe that *Oliver* can or should sweep so broadly as to elevate, in a sense, the policy underlying a federal statute above that expressed in a federal constitutional provision.[51]

Indeed, the general principles of labor preemption dictate that even the *Oliver* type of preemption requires a closer nexus between the conduct which is the subject of federal labor policy and the effect of the state regulation challenged. In *Oliver* and the other cases relied on by the court of appeals, the challenged state law created a direct conflict with federal labor policy. No such conflict is presented by the Minnesota Pension Act.

The substantial reduction in the expected pension benefits, as noted earlier, is a critical threat to the welfare of the nearly 1,000 retirees who in many cases devoted most, if not all, of their working lives to White Motor.[52] Equally important, the

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[50] U.S. Const., art. I, § 10.

[51] White Motor's claim of NLRA preemption in the instant matter is, in a sense, analogous to the impairment-of-contract-argument under U.S. Const. art. I, § 10 still pending in federal district court. Both arguments are based on the assertion that the Minnesota Pension Act somehow interferes with or invalidates provisions of a collective bargaining contract. *See* App. at 10. White Motor, in fact, extensively briefed and orally argued the impairment-of-contracts claim as amicus curiae in Fleck v. Spannaus, —— F. Supp. —— No. 3-75 Civ. 178 (D. Minn. Sept. 2, 1977) (three judge court). Fleck involved another challenge to the Minnesota Pension Act on grounds almost identical to the constitutional claims still pending in the instant case. Yet, despite the assertions of the plaintiffs and White Motor as *amicus curiae*, the three-judge federal panel in Fleck unanimously upheld the constitutionality of the Act, relying substantially on this Court's well-established decisions which carve out an exception to impairment-of-contract principles for legitimate state police power statutes.

[52] Furthermore, the court of appeals' assertion that inadequate pension benefits were exchanged for increased wages, 545 F.2d at 609-610, should be viewed in light of the wages actually paid. Employees Grose, Pierce and Peters, for example, were being paid annual wages of only $10,000, $7,000 and $9,500 respectively after 27-30 years' service to White Motor when they retired. *See* App. at 62, 66 and 70.

approach of the court of appeals suggests a striking lack of sensitivity for our federal system and the presumption of validity which attaches to all legislation, including state legislation. A decision upholding the preemption of the Minnesota Pension Act by federal labor law would significantly undermine the power and authority of the individual states to legislate on a myriad of matters which touch and concern the bargaining process but lie only at the periphery of that process. Such an erosion of state authority in an area tangential to the bargaining process would effectively elevate all terms of a collective bargaining to a virtually untouchable status regardless of how significant the state interest or how minimal the relationship between the state law and the bargaining process. The blow that would be struck against the keystone of our constitutional system of federalism under the court of appeals' holding would be vastly more devastating than the alleged harm that the Minnesota Pension Act poses to national labor policy.

II. CONGRESS HAS EVIDENCED ITS DETERMINATION THAT STATE REGULATION OF PENSION PLANS IS COMPATIBLE WITH FEDERAL LABOR LAWS.

The NLRA contains no provisions that spell out the types of state regulation Congress intended it to preempt. This Court has pointed out that:

> A . . . factor that has played an important role in our shaping of the pre-emption doctrine has been the necessity to act without specific congressional direction. The precise extent to which state law must be displaced to achieve those unifying ends sought by the national legislature has never been determined by the Congress. . . .

Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 289 (1971).

Consequently, in the absence of express indications by Congress in the NLRA the courts have fashioned preemption standards based on their interpretation of congressional intent. Thus, in the field of pension plan regulation, it is important to note that there are relevant expressions of congressional intent. Unfortunately, the court of appeals read this intent in a contorted and narrow manner and attempted to minimize if not completely ignore its significance. However, to the extent that "the labor relations preemption doctrine finds its basic justification in the presumed intent of Congress[.]" *Lockridge, supra,* 403 U.S. at 302, those expressions cannot so readily be dismissed and ignored. In the adoption of both the Welfare and Pension Plans Disclosure Act of 1958, 72 Stat. 997 (hereinafter "the Pension Disclosure Act"), and ERISA, Congress has evidenced its intent that states had the power substantively to regulate state pension plans prior to ERISA.

A. The Pension Disclosure Act Expressly Reserved To The States Authority To Regulate The Administration And Dissolution Of Pension Plans.

The Pension Disclosure Act, a precursor to ERISA,[53] was enacted in 1958 following extensive congressional study of the need for legislation to protect employee pension and welfare benefits. Many of the same concerns and problems that

[53] The Pension Disclosure Act was superseded and repealed by ERISA. The Minnesota Pension Act has been preempted by ERISA, 29 U.S.C. § 1144(a). However, the preemption provision did not take effect until January 1, 1975 and it specifically does not apply to any cause of action which arose prior to January 1, 1975. 29 U.S.C. § 1144(b)(1). *See* Fleck v. Spannaus, —— Minn. ——, 251 N.W.2d 334 (1977).

were addressed by the Minnesota Pension Act motivated the enactment of the Pension Disclosure Act. As was stated in the Senate Report on the bill that was later enacted as the Pension Disclosure Act:

> Almost from the inception of congressional investigations into employee benefit plans, . . . it became apparent that there was a compelling need to more adequately protect the equities of the millions of persons who ever-increasingly were relying for their future economic security on the benefits which private employee welfare and pension plans held out.

S. Rep. No. 1440, 85th Cong., 2d Sess. (1958), 1958 *U.S. Code Cong. and Adm. News* 4137, 4139.

Among the "basic facts concerning this private social security system" that evidenced the need for protective legislation were the following:

> The employees covered by these group plans have no specific rights until they meet the conditions of the particular plans. For example, in the case of a pension plan this might involve 30 years' service and the attainment of age 65. . . .
>
> Although these plans envisaged a continuing operation to provide benefits for all employees covered—in plans which are not collectively bargained, which constitute the majority of all plans and which are predominantly administered by employers, there is actually no assurance that the benefits will be forthcoming in view of a universally employed clause in such plans to the effect that the employer can terminate the plan at his discretion. Even in collectively bargained plans the employer's agreement to provide for part or all the costs of the benefits is a short-term contract of 1 to 5 years.

S. Rep. No. 1440, 85th Cong., 2d Sess. (1958), 1958 *U.S. Code Cong. and Adm. News* 4137, 4140.

Additionally, Congress determined that as a result of the frequent failure to provide participants in pension and welfare plans with adequate information concerning the plans' operations

> [m]illions of employee-beneficiaries . . . rely blindly on the good faith of plan administrators . . . this in spite of the fact that the vast majority of plans contain provisions specifically restricting the extent of liability for the benefits provided. . . .

S. Rep. No. 1440, 85th Cong., 2d Sess. (1958), 1958 *U.S. Code Cong. and Adm. News* 4137, 4150-4151.

Thus, Congress found a need for legislation addressing the problem of detrimental reliance by employees on the expectation of pension plan benefits. Nevertheless, in attempting to alleviate the problems involving pension plans through the Pension Disclosure Act, Congress chose to limit the role of the federal government to requiring reporting on and disclosure of information concerning the terms and administration of such plans. That limitation, however, did not reflect a decision to leave pension plans free of further regulation, for the Pension Disclosure Act specifically provided that:

> The provisions of this chapter . . . shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State *affecting the*

operation or administration of employee, welfare or pension benefit plans or in any manner to authorize the operation or administration of such plan contrary to any such law.

Section 10(b), 72 Stat. 1003 (emphasis added).

Thus, it is clear from the literal language of section 10(b) of the Pension Disclosure Act that Congress fully intended the individual states to have the power to enact and/or enforce laws such as the Minnesota Pension Act relating to the "operation or administration" of employee pension plans. Any doubt as to the scope of authority left to the states under section 10 (b) is eliminated by referring to the legislative history of this provision where the Senate Report noted:

> [The Pension Disclosure Act] is a disclosure statute and by design endeavors *to leave regulatory responsibility to the States.*
>
> * * *
>
> . . . It is designed to place the primary responsibility for the policing and improved operations of these plans upon the participants themselves, with a minimum of interference in the natural development and operation of such plans, *to leave to the States the detailed regulations relating to insurance, trusts, and other phases of their operations. . . .*

S. Rep. No. 1440, 85th Cong., 2d Sess. (1958), 1958 *U.S. Code Cong. and Adm. News* 4137, 4153-4154 (emphasis added).[54]

[54] The references in the above-quoted language to regulations relating to insurance and trusts are apparently by way of illustration rather than limitation.

In People v. Automobile Transporters Welfare Fund, 17 App. Div. 2d 448, 453, 235 N.Y.S.2d 702, 706 (1962), *aff'd mem.*, 13 N.Y.2d 814, 192 N.E.2d 222, 242 N.Y.S.2d 345 (1963), *cert. denied*, 376 U.S. 908 (1964), the court held that the Pension Disclosure Act preempted the states from requiring the "duplication of the report-making required of welfare funds." The court further stated that it was clear that the "expressed purpose [of the Pension Disclosure Act] was not to displace State regulation of welfare funds." *See also* Thacher v. United Construction Wkrs., 10 N.Y.2d 439, 444, 180 N.E.2d 245, 247, 224 N.Y.S.2d 657, 660 (1960).

The court of appeals, however, chose to read section 10(b)'s grant of authority to the states in a narrow and restrictive manner and held that this provision did not authorize state regulation of pension plans by statutes such as the Minnesota Pension Act. 545 F.2d at 609. Such a circumscribed reading of section 10(b) overlooks not only the specific language of that provision and its legislative history noted above but also totally neglects the fact that the Senate Report noted a specific awareness about the exact type of problem presented herein, *i.e.*, pension plans which "contain provisions specifically restricting the extent of liability for the benefits provided. . . ." S. Rep. No. 1440, 85th Cong. 2d Sess. (1958), 1958 *U.S. Code Cong. and Adm. News* 4137, 4150-51. Although aware of such problems relating to funding, Congress did not address them in the 1958 Pension Disclosure Act. However, it is implausible to assume, as the court of appeals apparently did, that even though Congress was fully aware of the problems of plans such as the White Motor Plan which restrict the extent of its liability, that Congress did not wish to allow the states to retain the power to address such problems if they so desired.

In addition, the legislative history of the Pension Disclosure Act also reveals that Congress was aware that it was dealing with both collectively-bargained pension plans and those not so bargained for, and of relevant distinctions between those

two types of plans. *See, e.g.*, S. Rep. No. 1440, 85th Cong., 2d Sess. (1958), 1958 *U.S. Code Cong. and Adm. News* 4137, 4143-4144; H.R. Rep. No. 2283, 85th Cong., 2d Sess. (1958), 1958 *U.S. Code Cong. and Adm. News* 4181, 4188-4189.[55]

Thus, the enactment of the Pension Disclosure Act and its legislative history establishes that as early as 1958 Congress recognized the same problems in the pension area that prompted promulgation of the Minnesota Pension Act, that Congress acknowledged the validity of state regulation of pension plans in order to address those problems, and that Congress did so in full awareness of the relationship between the regulation of pension plans and its labor policy.[56]

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[55] The minority and supplemental views that United States Senator Gordon Allott expressed in that Senate Report raised particular concern for the effect of the Pension Disclosure Act on the collective bargaining process. S. Rep. No. 1440, 85th Cong., 2d Sess. (1958), 1958 *U.S. Code Cong. and Adm. News* 4137, 4168 and 4175.

[56] The district court below correctly noted analogous areas in which the scope of NLRA preemption has been limited as a result of evidence of congressional intent not expressed in the NLRA itself. Specifically, the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, permits states to impose minimum wage laws more stringent than the federal act. Indeed, it does so by stating that the federal law does not excuse noncompliance with such state laws. 29 U.S.C. § 218(a). It is, thus, similar in approach to the language in the Pension Disclosure Act. The district court additionally made reference to Smith v. Evening News Assoc., 371 U.S. 195 (1962), in which the Supreme Court, in limiting the scope of preemption under § 8 of the NLRA, 29 U.S.C. § 158, relied on a related but separate Congressional labor enactment, § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1975). *See* Super Tire Engineering Co. v. McCorkle, 412 F. Supp. 192 (D.N.J. 1976), *aff'd*, 550 F.2d 903 (3rd Cir. 1977), *cert. denied*, 46 U.S.L.W. 3200 (Oct. 4, 1977).

B. The Enactment of ERISA And The Acknowledgement In ERISA Of The Existence And Efficacy Of Similar State Legislation Evidences The Lack Of Conflict Between Pension Protection And The NLRA.

A more recent indication that Congress perceives no conflict between pension protection, such as that provided by the Minnesota Pension Act, and the federal labor policy embodied in the NLRA was the enactment of ERISA, 29 U.S.C. § 1001 *et seq.* on September 2, 1974. That indication is manifested in two respects: 1) the very enactment of such federal regulation and 2) the acknowledgement in ERISA of the existence and efficacy of similar state regulation.

1. Federal regulation of pension plans through ERISA indicates a lack of conflict between such regulation and federal labor policy and implies a lack of conflict between state regulation of pension plans and federal labor policy.

The enactment of ERISA was a recognition that existing state and federal legislation had not been adequate to provide the necessary protection of accrued pension benefits. *See generally* 29 U.S.C. § 1001(a). Indeed, the same basic problems addressed by the Minnesota Pension Act were the object of ERISA. As the congressional findings and declaration of policy set forth in ERISA indicate, that legislation is, like Minnesota's, mainly directed at the problem of the forfeiture of accrued pension benefits that often occurs when a pension plan is terminated because the pension plan does not provide for early vesting benefits or is not sufficiently funded to fully pay benefits already accrued and vested, much less those accrued

but not yet vested. The policy of ERISA was to protect against such forfeitures by mandating minimum vesting and funding standards, which must be incorporated into private pension plans, in addition to establishing an insurance program that provides for the payment of pension benefits in the event of the termination of an underfunded plan. *See* 29 U.S.C. § 1001.

By the enactment of the minimum participation, vesting and funding provisions of ERISA[57] which impose direct restrictions on the substantive terms of pension plans, Congress interferes with the terms of pension plans far more directly than the Minnesota Pension Act does. Additionally, the termination insurance provisions of ERISA[58] impose a liability on employers for the payment of pension benefits forfeited because of an employer's termination of a pension plan.

Significantly, ERISA provides no exemption from its coverage for collectively-bargained pension plans. Moreover, Congress imposed its substantive requirements on pension plans, including those collectively-bargained-for, without purporting to modify or alter its NLRA labor policy concerning collective bargaining.[59] In fact, Congress, in ERISA, explicitly disclaimed any such modification or alteration of other federal laws:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law

[57] 29 U.S.C. §§ 1051-1102.

[58] 29 U.S.C. §§ 1301-1381.

[59] Congress certainly had the opportunity in its enactment of ERISA to exempt collectively-bargained pension plans from its pervasive substantive regulation. However, it did not do so. Only minimal accommodation to its existing labor policy was deemed necessary by Congress, such as a delay in the effective date of certain funding requirements for collectively-bargained plans. 29 U.S.C. § 1086(c)(1) (1975). *See also* 26 U.S.C. § 410(b)(2)(A) (Supp. 1977) (ERISA amendment to the Internal Revenue Code).

> of the United States (except as provided in sections 1031 and 1137(b) of this title). . . .

29 U.S.C. § 1144(d). The most direct and logical conclusion to be derived from the fact that Congress imposed its regulation of pension plans on collectively-bargained plans is that such regulation poses no conflict with the collective bargaining process. Since Congress did not believe that ERISA interfered with the NLRA, it follows that the Minnesota Act does not in any way interfere with the NLRA. *Cf. DeVeau v. Braisted*, 363 U.S. 144, 156 (1960).[60]

2. ERISA treatment of state laws evidences congressional recognition that they do not contravene federal labor policy.

The treatment accorded state laws relating to pension plans by ERISA is a further indication that Congress perceived no conflict between its NLRA labor policy and state regulation of pension plans to protect pension benefits. Although such state laws are preempted by ERISA, presumably to avoid duplicate or inconsistent regulation of pension plans, preemption was not made effective until January 1, 1975. 29 U.S.C. § 1144(a).[61] Additionally, state pension laws were not pre-

[60] In DeVeau, this Court upheld a New York law which, in effect, barred an ex-felon from holding office in a union on the waterfront in the Port of New York. In responding to the claim that the New York law was preempted by the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.*, which provided for the same bar on ex-felons, this Court said,

> The fact that Congress itself has thus imposed the same type of restriction upon employees' freedom to choose bargaining representatives as New York seeks to impose through [its Act], namely, disqualification of ex-felons for union office, is surely evidence that Congress does not view such a restriction as incompatible with its labor policies. 363 U.S. at 156.

[61] This provision reads as follows:

> Except as provided in subsection (b) of this section, the pro-

empted at all with respect to causes of action that arose and acts or omissions that occurred prior to that date. 29 U.S.C. § 1144(b)(1).

Furthermore, a review of the legislative history of ERISA's preemption provision shows that, in providing for delayed preemption and for the enforcement exception to preemption just noted, Congress was fully cognizant of the existing power of states to regulate the substantive aspects of pension terminations. For example, the House version of the Bill which eventually became ERISA provided in part as follows:

> (2) It is declared to be the intent of Congress that the vesting, funding, and plan termination insurance provisions of title I are to *supersede all State laws that may now or hereafter relate to (a) the nonforfeitability of participant's benefits in plans covered by the vesting and funding requirements, (b) the funding requirements of such plans,* (c) the adequacy of financing such plans, (d) the portability requirements, and (e) the insurance of pension benefits under such plans.

(Emphasis added.)[62]

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visions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan. . . . This section shall take effect on January 1, 1975.

[62] *Staff of Conference Committee on H.R. 2,* 93d Cong., 2d Sess., Summary of Differences Between the Senate Version and the House Version of H.R. 2, pt. 3 at 32-33 (1974). Similarly, when the Senate version, S. 4, was initially reported out of the Senate Labor Committee, the Committee Report made it clear in discussing the preemption provision that it was aware of the state power concerning the substantive aspects of pension regulation and intended that ERISA should supersede such power.

Except where plans are not subject to the Retirement Income Security for Employees Act or the Welfare and Pension Plans Disclosure Act, and in certain other enumerated circumstances, state law is preempted. *Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards,* for evaluating fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports. As indicated previously, however, the Act expressly authorizes cooperative arrangements with state agencies as well as other federal agencies, and provides that state laws regulating banking, insurance or securities remain unimpaired.

S. Rep. No. 127, 93d Cong., 1st Sess. (1973). (Emphasis added.) Congress was also aware that at least 20 state legislatures including Minnesota were considering various pension reform measures, many of which would substantively affect pensions and pension terminations. House Comm. on Ways and Means, 93d Cong. 1st Sess., pt. 1, at 447-52, Written Statements Submitted by Interested Organizations and Individuals on H.R. 10470 (Comm. Print 1973). *See also* Affidavit of Stanley A. Enebo, App. at 44.

[63] 120 Cong. Rec. 29942 (1974).

In addition, in explaining the Conference Report to the Senate, Senator Jacob Javits, one of the managers of the Senate Bill, noted that state termination insurance plans would thenceforth be preempted.[63]

Thus, it is clear that Congress, in enacting ERISA, was aware of the state power in the area of the substantive regulation of pension plans. If Congress had perceived any conflict between such state laws and its labor policy under the NLRA, it is quite unlikely that it would have allowed such statutes to remain in effect even from September 2, 1974, (the date ERISA became law) to January 1, 1975, the effective date of the preemption provision. Nor is it logical that Congress would have provided the exception in 29 U.S.C. § 1144(b)(1), for the continued validity of causes of action arising prior to January 1, 1975, if it considered them to be in conflict with national labor policy. *Cf. DeVeau v. Braisted,* 363 U.S. 144, 147-55 (1960).

III. THE MINNESOTA PENSION ACT IS A VALID POLICE POWER ENACTMENT DIRECTED AT THE HEALTH, SAFETY AND WELL-BEING OF ITS CITIZENS AND THEREFORE IS NOT PREEMPTED BY THE NLRA.

The power of the states to enact and enforce laws of general applicability dealing with the health or safety of their citizens in the context of labor relations has repeatedly been reaffirmed by this Court. *Farmer v. United Brotherhood Local 25*, 97 S.Ct. 1056, 1061-65 (1977); *Lodge 76, Machinists v. Wisconsin Employment Relations Comm.*, 427 U.S. 132, 136 (1976); *Local 24, Teamsters Union v. Oliver*, 358 U.S. 283, 297 (1959).

This Court has recently discussed the breadth of these police powers, emphasizing that

> [s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wages laws, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples.

DeCanas v. Bica, 424 U.S. 351, 356 (1976).

In examining whether the "state's interest in protecting the health and well-being of its citizens," *Farmer v. United Brotherhood Local 25, supra*, 97 S.Ct. at 1065, is substantial enough to offset any possible effect on federal labor law, this Court must make a "balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulations." 97 S.Ct. at 1064.

The interests of the State of Minnesota in the Minnesota Pension Act are obviously substantial. The Act was passed in recognition of the severe hardship that arises when workers devote much if not all of their working life to a company and then see their pension benefits extinguished or greatly reduced because of termination of the plan or some event of similar effect. The forfeiture of such pension income is particularly devastating because it affects people at an age when they frequently have no other source of significant income beyond Social Security and are normally too old or infirm to reenter the labor force. As a result, the loss of this expected pension income can result in the inability to maintain adequate shelter, clothing, or nutrition. Aside from the personal trauma caused by such a forfeiture of pension benefits, it may force people who have worked most of their lives to apply for state welfare benefits thus greatly increasing the demand for welfare funds and related services.

These significant interests of the state of Minnesota in protecting its workers from the permanent loss of their pension rights are surely even greater than the states' interests in granting striking workers temporary relief in the form of welfare benefits or unemployment compensation; forms of relief which have been repeatedly upheld by the courts against claims that they were preempted by the NLRA. *See, e.g., Grinnell Corp. v. Hackett*, 475 F.2d 449 (1st Cir.), *cert. denied*, 414 U.S. 59 (1973); *Super Tire Engineering Co. v. McCorkle*, 412 F. Supp. 192 (D.N.J. 1976), *aff'd*, 550 F.2d 903 (3d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3200 (Oct. 4, 1977); *Kimbell, Inc. v. Employment Security Comm.*, 429 U.S. 804 (1976), *dismiss-*

ing for want of a substantial federal question (unreported opinion, New Mexico Supreme Court).[64]

While strikes are usually of comparatively short duration[65] and create only a temporary interruption in the income of a worker, the forfeiture of pension benefits is permanent and normally affects people too aged to compete effectively for positions in the work force. Such a forfeiture causes cruel and incalculable hardships on workers who have spent most of their lives in productive work and desire only the opportunity to retire with their expected pension benefits.

Not only is the state interest in protecting its workers from the forfeiture of their pension benefits greater than a state's interest in granting welfare or unemployment compensation to strikers, but the second part of the *Farmer* balancing test—the potential for interference with federal labor law—is substantially lower than in cases involving welfare and unemployment compensation to strikers.

In *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 124 (1974), this Court recognized that the availability of state welfare aid had some effect on the collective bargaining

[64] The court of appeals in subsequent litigation in Super Tire examined the pleadings presented to this Court in Kimbell and found that the question of whether granting unemployment compensation benefits to strikers unconstitutionally interfered with federal labor law had been squarely presented to this Court. Super Tire Engineering Co. v. McCorkle, 550 F.2d 903, 906 & n. 4 (3d Cir. 1977); *see also* ITT Lamp Div. v. Minter, 435 F.2d 989 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971); Lascars v. Wyman, 31 N.Y.2d 386, 292 N.E.2d 667, 340 N.Y.S.2d 397 (1972), *cert. denied*, 414 U.S. 832 (1973); Comment, *Federal Preemption of State Welfare and Unemployment Benefits For Strikers*, 12 Harv. Civ. Rights, Civ. Lib. L. Rev. 441 (1977); *but see* Hawaiian Tel. Co. v. Hawaii Dept. of Labor & Industrial Relations, 405 F. Supp. 275 (D. Hawaii), *appeals docketed*, Nos. 76-1584, 2050 (9th Cir. 1976).

[65] *See, e.g.*, Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 126 (1974).

process. Notwithstanding that point, however, this Court has not deemed that relationship to be sufficiently significant to raise a substantial federal question. *Kimbell, Inc. v. Employment Security Comm.*, 429 U.S. 804 (1976).[66]

While welfare assistance to strikers "pervades every work stoppage" and is "a factor lurking in the background of every incipient labor contract," *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 124 (1974), the Minnesota Act, as discussed above, has only a tangential effect on the bargaining process. The Minnesota Act does not in any way intrude into the employer-employee relationship. It does not even apply to the situation where both the employment relationship and the pension plan remain in effect. Rather, it comes into play only when there is a termination of a pension plan or when all or a substantial number of the employees covered by such a plan are discharged. And even then, there is the further requirement that such a termination must result in a forfeiture of accrued pension credits before the Minnesota Pension Act can apply.

The protection of the economic welfare of elderly citizens by preventing the loss of pension benefits is within the health, safety and well-being exception recognized in *Farmer* and *Oliver*. While this exception to labor preemption in the past has normally been applied to situations involving violence or physical safety, recent cases upholding the grant of welfare benefits and unemployment compensation to strikers, and the application in *Farmer* of the exception to a non-violent tort in the labor arena, suggest a recognition by this Court and lower courts that the policy considerations underpinning the

[66] *Cf* Ohio Bureau of Employment Services v. Hodory, 97 S. Ct. 1898, 1902 n. 3 (1977).

exception may apply with equal force to circumstances where the economic welfare of a state's citizens presents critical problems related to their health, safety or well-being.[67]

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[67] *See* Baltimore & Ohio R.R. v. Dept. of Labor and Industry, —— Pa. ——, 334 A.2d 636, 643 (1975); Walker Manufacturing Co. v. Industrial Comm., 27 Wis.2d 69, 135 N.W.2d 307 (1965). Significantly, the United States, in its *amicus curiae* brief to this Court in the instant case stated that the Minnesota Pension Act was a "proper exercise of this state's police power." Memorandum for the United States as Amicus Curiae at 7-9.

CONCLUSION

The established judicial tests for preemption do not warrant invalidation of the Minnesota Pension Act. Furthermore, Congress, through the Pension Disclosure Act and ERISA, has indicated its intent that pension regulation was to be left to the states until ERISA became effective. In addition, the passage of the Minnesota Pension Act was a valid exercise of the sta'e's police power.

Based on the foregoing, this Court should reverse the decision of the court of appeals and order it to reinstate the judgment of the district court granting summary judgment to the state on the issue of NLRA preemption.

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